IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE V.GIRI

FRIDAY, THE 30TH NOVEMBER 2007 / 9TH AGRAHAYANA 1929

WP(C).No. 3115 of 2007(U)

PETITIONER:

**PEPSICO INDIA HOLDINGS PVT.LTD.
WISE PARK INDUSTRIAL DEVELOPMENT AREA,
KANJIKODE EAST,PALAKKAD 678 621, REPRESENTED
BY ITS MANAGER (PLANT ACCOUNTING),
MR. NEERAJ KHETAN.**

**BY ADV. SRI.JOSEPH VELLAPALLY (Sr.)
SRI.A.M.SHAFFIQUE
SRI.E.K.NANDAKUMAR
SRI.JAYASANKAR
SRI.ANIL D.NAIR**

RESPONDENTS:

1. **STATE OF KERALA, REPRESENTED BY THE CHIEF SECRETARY TO GOVERNMENT OF KERALA, SECRETARIAT, THIRUVANANTHAPURAM.**
2. **THE COMMISSIONER OF COMMERCIAL TAXES, THIRUVANANTHAPURAM.**
3. **THE DEPUTY COMMISSIONER(GENERAL), DEPARTMENT OF COMMERCIAL TAXES, THIRUVANANTHAPURAM.**
4. **THE DIRECTOR OF INDUSTRIES AND COMMERCE, THIRUVANANTHAPURAM.**
5. **THE ADDITIONAL SALES TAX OFFICER, SECOND CIRCLE, PALAKKAD DISTRICT.**
6. **THE DEPUTY TAHSILDAR (RR), PALAKKAD.**

BY SPL.GOVERNMENT PLEADER SRI.VINOD CHANDRAN for R1 to R6

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 26/10/2007, THE COURT ON 30/11/2007 DELIVERED THE FOLLOWING:

KSS

APPENDIX

PETITIONER'S EXHIBITS:

EXT.P1: COPY OF THE NOTIFICATION SRO 1729/93 AS AMENDED BY NOTIFICATIONS SRO 1092/99 AND SRO 295/2000.

EXT.P2: COPY OF THE JUDGEMENT DTD. 07/01/2004 OF THE LEARNED SINGLE JUDGE IN OP.NO.8563 OF 2003 PASSED BY THIS HON'BLE COURT.

EXT.P3: COPY OF THE JUDGEMENT DTD. 15/06/2004 OF THE DIVISION BENCH OF THIS HON'BLE COURT IN WRIT APPEAL NO. 543 OF 2004.

EXT.P4: COPY OF THE SPECIAL LEAVE PETITION PREFERRED BY THE STATE GOVERNMENT BEFORE THE HON'BLE SUPREME COURT DTD. 29/07/04.

EXT.P5: COPY OF THE ORDER IN SPECIAL LEAVE TO APPEAL (CIVIL) NO.17308/2004 DTD. 03/09/2004 PASSED BY THE HON'BLE SUPREME COURT OF INDIA.

EXT.P6: COPY OF THE COMMUNICATION NO.FC4/19094/01 DTD. 11/10/2004 ISSUED TO THE PETITIONER IN THAT REGARD BY THE DIRECTOR OF INDUSTRIES AND COMMERCE.

EXT.P7: COPY OF THE LETTER DTD. 11/05/1999 FROM THE PETITIONER TO THE STATE GOVERNMENT.

EXT.P8: COPY OF THE LETTER DTD. 13/05/1999 ISSUED TO THE PETITIONER BY THE KSIDC.

EXT.P9: COPY OF THE APPLICATION DTD. 20/06/2001 MADE BY THE PETITIONER FOR SALES TAX EXEMPTION UNDER THE NOTIFICATION.

EXT.P10: COPY OF THE ORDER DTD. 08/06/2003 OF THE DIRECTOR OF INDUSTRIES AND COMMERCE REJECTING THE PETITIONER'S APPLICATION.

EXT.P11: COPY OF THE ORDER DTD. 03/07/206 PASSED BY THIS HON'BLE COURT IN WP(C) NO.15858/06.

EXT.P12: COPY OF THE ORDER DTD. 25/07/2006 IN WP(C) NO. 15858/06 PASSED BY THIS HON'BLE COURT.

EXT.P13: COPY OF THE NOTICE NO.C.4-6410/04 DTD. 20/06/2005 ISSUED BY THE 2ND RESPONDENT.

EXT.P14: COPY OF THE LAWYERS' NOTICE DTD. 30TH JUNE 2005 (SENT FOR THE PETITIONER) SENT TO THE RESPONDENTS 2 AND 3.

EXT.P15: COPY OF THE LETTER DTD. 16/06/2006 THE PETITIONER REQUESTED TO THE 4TH RESPONDENT TO ISSUE A COPY OF THE ELIGIBILITY CERTIFICATE.

EXT.P16: COPY OF THE LETTER DTD. 17/06/2006 ISSUED BY THE 4TH RESPONDENT.

EXT.P17: COPY OF THE LETTER DTD. 07/07/2006 SENT TO THE 3RD RESPONDENT.

EXT.P18: COPY OF THE LETTER DTD. 13/07/06 FROM THE PETITIONER TO THE 2ND RESPONDENT.

EXT.P19: COPY OF THE LETTER DTD. 17/07/2006 NO.C4-6410/04, THE 2ND RESPONDENT TO THE PETITIONER.

EXT.P20: COPY OF THE LETTER DTD. 03/08/2006 WITHOUT ENCLOSURE, FROM THE PETITIONER TO THE 4TH RESPONDENT.

EXT.P21: COPY OF THE NOTICE NO.C.4-46410/04 DTD. 20/09/2006 ISSUED BY THE 2ND RESPONDENT.

EXT.P22: COPY OF THE REPLY DTD. 29/09/2006 PETITIONER SENT TO THE 3RD RESPONDENT.

EXT.P23: COPY OF THE WRITTEN SUBMISSION DTD. 01/12/2006 FILED BEFORE THE 3RD RESPONDENT WITHOUT ITS ENCLOSURES.

EXT.P24: COPY OF THE ORDER DTD. 05/01/2007 PASSED BY THE 3RD RESPONDENT.

EXT.P25: COPY OF THE FLOW CHART WHICH WILL SHOW THE ACTIVITIES CARRIED OUT IN THE PETITIONER'S PLANT AT KANJIKODE FOR MANUFACTURE OF SOFT DRINKS.

EXT.P26: COPY OF THE LETTER DTD. 04/06/1999 FROM THE CHAIRMAN, KSIDC.

EXT.P27: COPY OF THE DETAILS OF THE ITEMS OF PLANT AND MACHINERY IN RESPECT OF WHICH FIRM ORDERS WERE PLACED PRIOR TO 01/01/2000 ARE GIVEN IN A TABULAR FORM.

EXT.P28: COPY OF THE REVENUE RECOVERY NOTICE NO. C206/03-04/ST DTD. 05/09/2003 ISSUED BY THE TAHSILDAR (RR), PALAKKAD.

EXT.P29: COPY OF THE ORDER NO.3112 2676/02-03 DTD. 04/02/2003 PASSED BY THE 5TH RESPONDENT.

EXT.P30: COPY OF THE REVENUE RECOVERY NOTICE NO.C 205/03-04/ST DTD. 05/09/2003 ISSUED BY THE TAHSILDAR (RR), PALAKKAD.

EXT.P31: COPY OF THE RECEIPT NO.C-205,206/03-04/ST, DOCUMENT EVIDENCING PAYMENT OF THE RS.1 CRORE, DTD. 16/03/2007 ISSUED BY THE TAHSILDAR (RR), PALAKKAD.

EXT.P32: COPY OF THE LETTER OF PROTEST DTD. 16/03/2007 FROM THE PETITIONER TO THE DISTRICT COLLECTOR, PALAKKAD.

EXT.P33: COPY OF THE NOTICE DTD. 07/03/2007 ISSUED U/S.17(3) OF THE KGST ACT (KGST A.Y.2002-03) ISSUED BY THE COMMERCIAL TAX OFFICER, PALAKKAD.

EXT.P34: COPY OF THE JUDGEMENT IN WP(C) NO.15858 OF 2006 (K) DTD. 25/01/2007 PASSED BY THIS HON'BLE COURT.

1ST RESPONDENT'S EXHIBIT:

EXT.R1(A): COPY OF THE PROCEEDINGS DTD. 11/10/2004 OF THE DIRECTOR OF INDUSTRIES AND COMMERCE.

/TRUE COPY/

P.A.TO JUDGE

KSS

V. GIRI ,J.

WP(C).NO. 3115 of 2007

Dated this the 30th day of November, 2007

JUDGMENT

The petitioner challenges Ext.P24 order passed by the Deputy Commissioner (General), Department of Commercial Taxes, Thiruvananthapuram, declining its application for exemption from payment of sales tax in terms of SRO 1729/93 as amended by SRO 1092/99 and modified by SRO 295/2000. Though SRO.No.1729/93 has been considered and discussed by this court as also the Supreme Court on more than one occasion, the scope and ambit of the two other notifications have not been squarely considered by this court, except on a previous occasion involving the same assessee, in a judgment inter partes in OP.No.8563/2006. By the said judgment (Ext.P2) this court had remitted the question of eligibility in terms of SRO 1729/93 to be considered by the Director of Industries. A conditional certificate of eligibility was issued by the Director. The Deputy Commissioner (General) declined to issue a certificate of exemption in favour of the petitioner and hence this writ petition

challenging the order passed by the third respondent, the Deputy Commissioner.

2. The petitioner, in 1999, decided to set up a medium scale unit for the manufacture of soft drinks under the brand name of 'Pepsi'. The petitioner contends that it's decision to set up the unit in Kerala was largely influenced by the fact that the Government of Kerala had, with a view to attracting investment into the State, announced certain tax exemption schemes for the benefit of new industrial units established in the State. The notification referred to in this regard is SRO.No.1729/93. Apparently a major portion of the controversy which is currently involved in so far as the petitioner is concerned, would not have arisen but for the amendment of SRO. No. 1729/93 by SRO.No.1092/99 which was later modified by SRO 295/2000. Three notifications have been produced as Ext.P1. For the sake of convenience, I will refer to SRO.No. 1729/93 as Ext.P1, SRO.Nos.1092/99 and 295/2000 as Ext.P1(a) and P1(b). As per clause (4) of Ext.P1 notification, in the case of new industrial units under medium and large scale category there shall be an exemption for a period of seven years from the date of commencement of commercial production- (a) in respect of the

tax payable by such units under the Kerala General Sales Tax Act, 1963 (i) on the turn over of sale of goods manufactured and sold by them within the State and (ii) on the turn over of goods, taxable at the point of last purchase in the State, which are used by such units for manufacturing other goods for sale within the State or interstate (b) in respect of the surcharge payable under section 3 of the Kerala Surcharge on Taxes Act, 1957. Clause 10 of Ext.P1 notification enumerates the conditions and restrictions in relation to grant of exemption in the case of new industrial units. The aggregate exemption in respect of sales tax, purchase tax, surcharge and central sales tax payable together shall not exceed 100% of the fixed capital investment. Clauses 10(b) and 10(c) deal with the issuance of an eligibility certificate and orders of exemption. The same reads as follows:-

> "10(b). Eligibility certificate for medium and large scale industries assisted by the Kerala State Industrial Development Corporation or the Kerala Financial Corporation will be issued by the Corporation which render assistance and in other cases by the Director, on application by such

units, and orders of exemption will be issued by the Secretary, Board of revenue (Taxes), Thiruvananthapuram.

10(c). Eligibility certificate and orders on exemption will be issued by the authorities mentioned in sub clause (b) above, if the unit is eligible for exemption or deferment of taxes and the units satisfy the conditions for the exemptions or deferment of taxes."

3. In the explanation to clause 10 of the notification the term 'manufacture' has been defined as follows:-

"Manufacture' shall mean the use of raw materials and production of goods commercially different from the raw materials used but shall not include mere packing of goods, polishing, cleaning, grading, drying blending or mixing different varieties of the same goods, sawing, garbling, processing one form of goods into another form of the same goods by mixing with chemicals or gas, fumigation or any other process applied for preserving the goods in good condition or for easy

transportation. The process of producing desiccated coconut shall be deemed to be 'manufacture' for the purpose of this notification."

4. By SRO.No.1092/99 (Ext.P1(a), the Government effected modification to the exemption granted under clause 1 to 7 of Ext.P1 notification. By the said notification it was declared that SRO.No.1729/93 shall apply only to the following categories of industries. Sub clause (i) and (ii) as inserted by the notification SRO.1092/99 alone are extracted hereunder, the other clause are not relevant.

"i) new industrial units other than public sector undertakings which have been set up or have commenced commercial production before 1st January, 2000.

ii) new industrial units other than public sector undertakings which have taken effective steps for setting up new industrial unit prior to the 1st day of January, 2000. An industrial unit shall be considered to have taken such effective steps if it has (a) obtained provisional registration (applicable

only in the case of SSI units), (b) owned or acquired or has been allotted land for establishing the industrial unit and © applied for financial support from any regular financial institution/government or acquired the necessary plant and machinery provided that the unit commences commercial production on or before the 31st day of December, 2000."

5. The aforementioned notification Ext.P1(a) SRO.No.1092/99 was again modified by SRO.No.295/2000 (Ext.P1(b). The amended clause (ii) along with the clause which was inserted by SRO.No.295/2000 reads as follows:-

"(ii)new industrial units other than public sector undertakings which have taken effective steps for setting up new industrial unit prior to the 1st day of January, 2000. An industrial unit shall be considered to have taken such effective steps if it has (a) obtained provisional registration (applicable only in the case of SSI units), (b) owned or acquired or has been allotted land for establishing the industrial unit and applied for financial support from any regular financial institution/Government before

1.1.2000 or © in the case of self financed units acquired or placed firm orders for the purchase of the necessary plant and machinery before 1.1.2000 provided that the unit commences commercial production on or before the 31st December, 2001.

A unit shall be deemed to have placed firm orders, for the purchase of plant, machinery and equipments if such unit had made any advance payments therefore by means of demand draft or cheque which has been credited to the account of the seller prior to 1st January, 2000. The onus of proving that an industrial unit had placed firm order for purchase of such plant, machinery and equipments prior to 1st January, 2000 shall be on such industrial unit".

6. The amendment brought about by Ext.P1(a) and P1(b) notifications thus stood incorporated in SRO.No.1729/93. The net effect of the amendment notifications was therefore to restrict the exemption, provided by SRO.No.1729/93, to the following categories of units:

(i) new industrial units which have been set up or which have commenced commercial production before 1.1.2000

(ii) new industrial units which have taken

effective steps for setting up new industrial unit prior to the first day of January, 2000.

(iii) An existing unit which has taken effective steps for diversification, expansion or modernisation prior to the 1st day of January, 2000.

(iv) a sick small scale industrial unit which has been registered as a sick unit before the Director prior to the 1st day of January, 2000.

7. The assessee in the present case claims that it falls under category (ii). The other categories are not relevant for the purpose of the present case.

8. In the explanatory note to the amendment notification it is stated that the Government have decided to withdraw the exemption/deferment granted to industrial unit as per notification SRO.No.1729/93 which are set up on or after 1.1.2000. The benefit of exemption/deferment, as the case may be, will be granted in the case of units which have already commenced commercial production or have set up or which have taken effective steps to set up industrial units prior to 1.1.2000.

9. In other words, the amendment notification was intended to abridge the benefit of exemption granted under SRO.No.1729/93. The benefit of SRO.No.1729/93 will continue to be available to units which have commenced commercial production prior to 1.1.2000, to units which have been set up prior to 1.1.2000 and to units which have taken effective steps for setting up the new industrial unit prior to the first day of January, 2000. The controversy in the present case is centered around the issue as to whether the petitioner had taken effective steps for setting up the new industrial unit prior to the first day of January, 2000.

10. The notifications indicate what could be considered as effective steps for setting up the new industrial unit. They are (a) obtained provisional registration in the case of SSI units (b) owned or acquired or has been allotted land for establishing the industrial unit and applied for financial support from any regular financial institution/Government before 1.1.2000 © in the case of self financing units, acquired or has placed firm orders for the purchase of necessary plant and machinery before 1.1.2000. For all the aforementioned categories it is necessary that the unit commences commercial production on or before 31.12.2001.

The deeming provision inserted by SRO.No.295/2000 provides that the units have placed firm orders for the purchase of plant and machinery and equipments if such unit had made any advance payments therefore, by means of demand draft or cheque which has been credited to the account of the seller prior to 1st January, 2000. The onus of proving that an industrial unit had placed firm orders in the manner aforementioned shall be on such industrial unit. As noted above the amendment notification restricts the benefit of exemption otherwise granted under SRO.No.1729/93 to certain categories of units as enumerated above. The curtailment of the benefit of exemption otherwise promised under SRO.NO.1729/93 could have been challenged on the premise that such curtailment is hit by the principles of promissory estoppel, if such curtailment had come about abruptly without any saving clauses as such. Apparently, it is to obviate such challenge that the amendment notification provided that the exemption will continue to be available to units which have commenced commercial production or set up prior to 1.1.2000 and also to units which have taken effective steps to set up an industrial unit prior to 1.1.2000 so as to come under the purview of second category noted above.

11. The petitioner started commercial production on 6.3.2001 and on 20.6.2001, it applied for sales tax exemption. By an order dated 8.6.2003 the Director rejected the petitioner's application for eligibility holding that the petitioner had not acquired the necessary plant and machinery prior to 1.1.2000. The said order was challenged in OP.No.8563/2003. The order of the Director was set aside by this court and the matter was remitted back to the Director to pass fresh orders in the light of the observations made in the judgment and in accordance with law. Ext.P2 judgment was confirmed by the Division Bench of this court in W.A.No.543/2004 (Ext.P3). A special leave petition preferred against the same as SLP (Civil)No. 17308/2004 was dismissed as per Ext.P5. Subsequently, the issue was reconsidered by the Director, who passed fresh order (produced as Ext.R1(a) along with the counter affidavit filed on behalf of respondents 1 to 3 and 5) inter alia certifying that the petitioner had started commercial production for soft drinks and syrup on 7.3.2001 and the fixed capital investment eligible for sales tax exemption is Rs.30,46,94,552/-. After having certified the above mentioned facts, the Director of Industries included a rider to the following effect:

> "The eligibility certificate is issued on the condition that the Deputy Commissioner (General), Commercial Taxes who is the sanctioning authority shall decide the eligibility of the unit for sales tax exemption under the relevant notifications, vide general procedure in this regard clarified by the State Level Committee in its meeting held on 15.3.2003"

12. The certificate of eligibility Ext.R1(a) was issued on 11.10.2004. According to the petitioner, a copy of the said certificate was made available to it only when it was produced as Ext.R1(a) along with the counter affidavit filed on 22.2.2007.

13. On 20.6.2005 the third respondent Deputy Commissioner (General), the competent authority to issue the certificate of exemption proposed to reject the petitioner's claim for sales tax exemption on the premise that the petitioner has not satisfied the conditions in the notification. The gist of the notice is to the effect that only a new industrial unit which had taken effective steps for setting up a new industrial unit prior to 1.1.2000 is eligible for exemption. The petitioner had claimed that effective steps were taken by it and this was indicated by the

placement of firm orders for the supply of plant and machinery. The total claim of investment in plant and machinery is Rs.3210.13 lakhs. Thus the total cost of plant and machinery of the unit as claimed by the petitioner is Rs.32,10,13,534/-; that is necessary plant and machinery required for each and every stage of production. In the case of the company which is engaged in the production of soft drinks, necessary plant and machinery would mean machinery for drawing of water required in the manufacture of soft drinks, its purification to conform to requisite standards, machinery required for manufacturing the mix which goes into the making of the ultimate product, and machinery for the manufacture of the soft drink by mixing the ingredients in water and bottling and sealing and labelling of the soft drink. Necessary plant and machinery are all the components of machinery and equipments constituting a complete production plant, that is machinery necessary for all the stages of production right from the stage of drawing of water to the stages of manufacturing, bottling, sealing and labelling. After having said so, the notice further alleged that the unit had paid an advance payment only for the following four items prior to 1.1.2000:

Name of supplier	Description of Machinery	Machinery cost	Amount of advance	Date of payment
1.Selvel Conveyors, Mumbai	Pet and CSD Conveyor systems	40,00,000	4,00,000	24.12.99
2.KHS Machinery (P) Ltd. Ahamedabad	Paramix Plant consisting of Deareation plant,Mixing plant, Beverage chilling plant and Carbonation plant.	65,00,000	9,75,000	24.12.99
	Sub Total	1,05,00,000	13,75,000	
3. Sidel India (P).Ltd. Mumbai.	Installation, commissioning and training of blow moulding machine.	15,00,000	4,00,000	24.12.99
4. Skyline Engineering Contracts Ltd.	Basis civil Infrastructure works	80,00,000	4,00,000	24.12.99
	Total	2,00,00,000	21,75,000	

14. It is alleged that items 3 and 4 are not items of necessary plant and machinery, that therefore items 1 and 2 alone could be treated as components of necessary plant and machinery. What is contemplated by the notification is therefore "necessary plant and machinery" which would mean such plant and machinery as are required at all stages of production. It was alleged that the company had not taken effective steps for the purchase of necessary plant and machinery before 1.1.2000 and consequently it would not be entitled to sales tax exemption. The assessee was given time to file objections to this notice.

15. In Ext.P14 objections sent through the Advocate the assessee mainly asserted that the issue of eligibility having been considered by the Director of Industries, it is not open to the Deputy Commissioner of Commercial Taxes to again consider that question. Considerable reliance was also placed on observations in Ext.P2 judgment as to what could constitute effective steps for acquiring necessary plant and machinery. It was asserted that the proposal contained in Ext.P13 seems to be in direct conflict with the observations contained in Exts.P2 and P3 judgments. The assessee also contended that the proposal as per Ext.P13

seems to be in violation of the judgment of the High Court and therefore the assessee can attend a personal hearing only if a hearing is posted pursuant to the notice issued in accordance with the judgment. Nevertheless a further reply was sent on 13.7.2006 as Ext.P18. Apart from contending that the issue of eligibility has been decided by the Director of Industries and therefore the jurisdiction available with the Deputy Commissioner of Sales Tax is only to issue a certificate of exemption quantifying the exemption as such, the following facts were pleaded by the petitioner both in Exts.P14 and P18 reply:

> i)Filed IEM with SIA vide SIA ACFK/2655/SIA/IMO/1999 dated 28.12.1999.
>
> ii) Acquired 50 acres of land in Kanjikode, Palakkad District from Western India KINFRA on 28.12.1999, by executing a lease agreement dated 28.12.1999 and paying the entire consideration amount of Rs.2,77,64,000/- to Western India KINFRA vide DD dated 24.12.1999.
>
> iii) Obtained the necessary consent from the Kerala State Pollution Control Board on 20.12.1999.

iv) Placed orders for the supply of plant and machinery and effected payments through cheques drawn on the said suppliers which were duly credited to the accounts of the suppliers before 1.1.2000 as confirmed by the Deutsche Bank by their letter dated 29.9.2000.

v) Commenced commercial production by March, 2001. "

16. By a notice dated 20.9.2006 the third respondent Deputy Commissioner informed the petitioner that on further scrutiny it is also revealed that activities carried out by the petitioner's unit will not tantamount to "manufacturing" for the purpose of granting Sales Tax exemption as per SRO.No.1729/93. It was therefore proposed to reject the petitioner's application on the said premise also. Ext.P22 is the objection filed by the petitioner to Ext.P21. In Ext.P22 the petitioner reiterated the earlier contentions as contained in Exts.P14 and P18. It contended that what is involved is manufacture and the activity is not one of the excluded categories enumerated in the explanation to SRO.No.1729/93.

The product which is manufactured is commercially different from the raw materials. What is involved is not merely packing of goods, polishing, cleaning, grading etc. and consequently the petitioner 's application for exemption cannot be rejected. It seems that there was a personal hearing on 23.11.2006. Written submissions were also submitted by the assessee and by Ext.P24 order dated 5.1.2007 the Deputy Commissioner had rejected the petitioner's application for sales tax exemption. Ext.P24 has been challenged in this writ petition.

17. In the counter affidavit filed by the respondents it is contended that the benefit of exemption granted under SRO.No.1729/93 was sought to be withdrawn with effect from 1.1.2000. Subsequent notifications were brought in for the said purpose. Nevertheless, the exemption granted under SRO.No.1729/93 was to be made available to units which had either commenced commercial production prior to 1.1.2000 or set up prior to 1.1.2000. It was also to be made available to self financing units provided such units had acquired or placed firm orders for the purchase of necessary plant and machinery before 1.1.2000. Reiterating the observations contained in the findings in Ext.P24 it is contended that the firm orders for necessary plant

and machinery had been placed before the cut off date, on 1.1.2000 only in respect of items 1 and 2 mentioned in the tabular statement extracted above. Obviously firm orders were not placed for "necessary plant and machinery", namely plant and machinery required for each and every stage of its activity, commencing from the purification of the bottles ending with the ultimate bottling, labeling and inspection of the product. There is also a contention that the activity carried on by the petitioner does not amount to manufacture and therefore the unit is not entitled to sales tax exemption.

18. The petitioner has filed a reply affidavit. I heard the learned senior counsel for the petitioner Sri.Joseph Vellappally and the special Government Pleader for Taxes Sri. Vinod Chandran.

19. Mr.Vellappally contended that Ext.P24 order suffers from the following fundamental infirmities.

> (1) The petitioner's eligibility for sales tax exemption was certified by the Director as per Ext.R1(a) and consequently it was not open to the Deputy Commissioner of Commercial Taxes, the third respondent to again consider that question.

The third respondent had the jurisdiction only to quantify the exemption that the petitioner was entitled to, eligibility having been already certified.

(2) That at any rate, the petitioner had taken effective steps for setting up a new industrial unit prior to the first day of January, 2000, being a self financing unit it had placed firm orders for the purchase of necessary plant and machinery before 1.1.2000. It has commenced commercial production before 31st of December, 2001.

(3) The finding in Ext.P24 that the activity carried on by the petitioner does not tantamount to manufacture is fundamentally erroneous.

Regarding contention No.(3)

20. If the production activity carried on by the petitioner's unit does not amount to manufacture, then obviously the petitioner would not be entitled to sales tax exemption in terms of SRO.No.1729/93. I will therefore deal with the said contention in the first instance. Ext.P25 is a rough flow chart indicating the manufacturing process undertaken by the petitioner. The process starts with sugar purification where

sugar is dissolved and subjected to carbon purification, filtration and finally to thermal treatment. Parallely CO2 is also purified. Apparently it is first vaporised and subjected to multi media filtration, by successively subjecting it to filtration with silica, alumina, carbon and micron. Treated liquid sugar is then blended with the syrup concentrate and then pumped into the filling plant where there is a mixure of treated water and treated liquid sugar. The flow chart also indicates the process of water purification. The veracity of Ext.P25 is not disputed. If this be the position then it is obvious that the manufacturing process which is undertaken by the petitioner cannot be taken as a mere adding of sugar to water and bottling the same. The final product is different from raw materials. What is excluded from the purview of "manufacture" under the notification is merely packing, polishing etc. It is also note worthy that the activity involved in the manufacture of soft drinks is treated as manufacture for the purpose of Central Excise Act and is made exigible to levy of central excise. In my view, the view taken by the third respondent in Ext.P24 to the effect that the activity carried on by the petitioner in its unit would not amount to manufacture as laid down in SRO.No.1729/93 is unsustainable.

Regarding contention No.(1)

21. The next aspect to be considered is whether the third respondent had exceeded his jurisdiction while passing Ext.P24 order finding that the petitioner has not satisfied the conditions laid down in SRO.No.1729/93 as amended by SRO.No.1092/99 and modified by SRO 295/2000. Mr.Vellapally contends that the jurisdiction of the third respondent in terms of SRO.No.1729/93 is only to quantify the exemption that the assessee would be entitled to. The petitioner's eligibility for tax exemption has already been certified by the Director as evidenced by Ext.R1(a) order. The scheme of the notification contemplates the eligibility to be first verified by the Director and once the Director certifies that, the Deputy Commissioner is to proceed from the stage where the unit is found eligible for tax exemption and quantify the exemption that the petitioner is entitled to. He contends that apart from the fact that this is what the notification suggests even from a plain reading thereon, in so far as the present case is concerned, Ext.P2 judgment of this court as affirmed by the Division Bench in Ext.P3 makes it clear that it is the Director of Industries who is the competent authority to certify the eligibility. Once he has so certified, then it is not open to the third

respondent to reconsider the same issue as if he is an appellate authority in relation to the Director of Industries, to decide the question of eligibility afresh. A mandamus was issued to the fourth respondent in Ext.P2 judgment to consider the question of eligibility. The third respondent is also a party to the said judgment. Respondents 3 and 4 and the State appealed against Ext.P2 and thereafter before the Supreme Court, unsuccessfully. The directions in Ext.P2 and the observations made therein with regard to the scope and ambit of SRO 1092/99 have become final and binding on the parties. It is further contended that the rider incorporated in Ext.R1(a) certificate issued by the Director of Industries to the effect that " this eligibility certificate is issued on the condition that the Deputy Commissioner (General), Commercial Taxes who is the sanctioning authority shall decide on the eligibility of the unit for sales tax exemption under the relevant notification, vide general procedure in this regard clarified by the State level Committee, in its meeting held on 15.3.2003" will have to be treated as ultravires the powers of the second respondent in terms of SRO 1729/93 and therefore liable to be eschewed from consideration.

22. Sri.Vinod Chandran, learned Special Govt. Pleader for taxes contended that the authority exercised by the Director of Industries on the one hand and the Deputy Commissioner of taxes, the third respondent on the other hand in terms of the notification do not overlap each other. What is contemplated by the statutory notification SRO.No.1729/93 is a system by which the Director of Industries decided the limit of eligibility which the unit would be entitled to avail as tax exemption. This limit is certified by the Director, taking into account the capital investment made by the unit. There are certain areas of expenditure which would not qualify for tax exemption. Those would therefore be excluded in deciding the limits of tax exemption. In the instant case a reading of Ext.R1(a) order would show that the Director has taken note of the fixed capital investment made by the unit. What is certified in Ext.R1(a) is fixed capital investment eligible for sales tax exemption and this is mentioned in para 8 of the certificate Ext.R1(a) in form 4. This is what is contemplated by the second respondent under the notification. Once a Director certifies the exemption limit then the issue as to whether the unit is entitled to exemption as such in terms of the statutory notification will have to be decided by a

competent authority in the taxes department, the Deputy Commissioner of Commercial Taxes. This is what is contemplated under the notification and this is what has been done by the Director while issuing Ext.R1(a). This court had in Ext.P2 judgment directed the fourth respondent to reconsider the petitioner's application for exemption. The direction can only be construed as one which required the fourth respondent to exercise his power in terms of the notification. An application submitted by the unit for tax exemption is finally disposed of only when the Deputy Commissioner of Commercial Taxes considers the question of tax exemption. A decision on the question of tax exemption would involve a decision on the question as to whether the unit is entitled to be exempted from payment of tax in terms of the statutory notification. It is this issue which has been decided by the third respondent the competent authority under Ext.P24 order. Sri. Vinod Chandran places reliance on the decision of this court in Tamil Nadu Ammonia Pvt. Ltd. vs. Secretary (Taxes) II,Board of Revenue (Taxes) and others (1998 (6)KTR 644 (ker). He further contended that contrary view has not been taken by the learned Judge in Ext.P2 judgment. (Ext.P2 judgment and Tamil Nadu Ammonia were both passed by

G.Sivarajan (J). Tamil Nadu Ammonia makes it clear that even if the authority who is to issue the eligibility certificate finds that a unit is eligible for exemption, if it is found by the authority who is to issue the exemption order that the said unit is not eligible for exemption claimed, it can refuse to grant exemption.

23. What is the delineation of the power exercised by the Director of Industries on one hand and Deputy Commissioner of Commercial Taxes on the other under the statutory notification SRO 1729/93?. The notification like any other statutory instrument is to be considered reasonably. A construction of the notification should be in consonance with the purpose of the notification issued under section 10 of the General Sales Tax Act. It cannot be gainsaid that an assessee can be considered as having been exempted from payment of tax in terms of the statutory notification only when a tax exemption certificate is issued. The competent authority in terms of the statutory notification to issue exemption certificate is the third respondent Deputy Commissioner. Clause 10 of SRO 1729/93 enumerates the conditions and restrictions applicable in the matter of exemption of sales tax provided for in the said notification. Clause 10(b) and 10(d) of SRO.No.1729/93 are relevant and

therefore are extracted hereunder:

> "10(b). Eligibility certificate for medium and large scale industries assisted by the Kerala State Industrial Development Corporation of the Kerala Financial Corporation will be issued by the Corporation which render assistance and in other cases by the Director, on application by such units, and orders of exemption will be issued by the Secretary, Board of revenue (Taxes), Thiruvananthapuram.
>
> "10(d) The eligibility certificate referred to in sub clause (b) above shall contain the date of commencement of commercial production and the monetary limit of exemption the unit is eligible for. The eligibility certificate issued in respect of existing medium and large scale industrial units which undertake expansion, modernisation or diversifiation shall also contain date of commencement as well as the date of completion of such expansion, modernisation or diversification."

24. The eligibility certificate for medium scale unit will have to be issued by the Kerala State Industrial Development Corporation or Kerala Financial Corporation, if the unit is rendered assistance by either one of those corporations. In other cases the eligibility certificate will have to be issued by the

Director. The petitioner being a self financing unit, the eligibility certificate in relation to the petitioner will have to be issued by the Director. Should the certificate of eligibility issued by the competent authority necessarily be a certificate of exemption.? Firstly clause 10(d) states that the eligibility certificate referred to in clause (b) shall contain the date of commencement of commercial production and the monetary limit of exemption the unit is eligible for. In my view clause 10(d) indicates what should necessarily be contained in the eligibility certificate issued under clause 10(b). This therefore could also be indicative of the parameters of the authority required to be exercised by the Director of Industries in terms of the notification. What is required to be certified in the eligibility certificate, is therefore the date of commencement of commercial production and the monetary limit of the exemption that the unit is eligible for. Can it be said that if these two factors are certified, the unit in question would be entitled to sales tax exemption? If these two factors are certified in the eligibility certificate issued by the Director, does it oblige the Deputy Commissioner of Commercial Taxes to necessarily consider the unit in question as entitled for tax exemption?. Mr. Vellapally contends that once the unit is

certified as eligible for tax exemption then the limited brief available to the Secretary, Board of Revenue or the Deputy Commissioner of Commercial Taxes (who is currently the competent authority) is only to quantify the monetary limits of the tax exemption that the unit is entitled to.

25. I am unable to accept this submission. If the said argument is extended to its logical conclusion, it will lead to a situation where the certificates of eligibility issued by the Director will have to be treated as certificate of actual exemption itself. In my view this would be clearly inconsistent with not only the express terms of the notification but also the intended purpose of the notification as such. I also take note of the fact that the authority competent to issue an eligibility certificate for medium and large scale industries would include not only the Director but also the KSIDC or KFC, where the unit is assisted by either of the these two agencies. The KFC is a statutory body incorporated under the State Financial Corporations Act. The KSIDC is a non statutory Government of Kerala undertaking. Both aforementioned Corporations are essentially financing agencies, intended to encourage industrial entrepreneurship in the State. But it would clearly be inconsistent with the scheme of tax

exemption as a whole to consider the said two agencies as competent to decide even a crucial question of entitlement of the unit for tax exemption. *Ejusdem generis,* the Director will have to be considered on a par with the competent authority in KSIDC or KFC as the case may be, in the context of issuance of an eligibility certificate. In my view the certification of eligibility of a unit for sales tax exemption in terms of clause 10(b) and 10(d) of SRO 1729/93 means only that unit has made a fixed capital investment to the extent of the ascertained figure and it started commercial production before the cut off date mentioned in the notification. In the event of the unit being found entitled to sales tax exemption, then the monetary limit for exemption is as certified therein. The certificate of eligibility cannot be treated as a certificate of entitlement for sales tax exemption. That comes at the second stage. Exemption is dependant on the entitlement of the unit for sales tax exemption which is to be certified by the Deputy Commissioner of Commercial Taxes, the competent authority.

26. I am fortified in coming to this conclusion by a decision of the learned judge of this court in Tamil Nadu

Ammonia. The learned judge undertook an elaborate exercise of the evaluation of the scheme for tax exemption in the State. Under SRO. No.521/92 the issue of sales tax exemption was made a two tier affair. Eligibility is to be certified by one authority and exemption order is to be issued by the sales tax authority mentioned in the notification. Learned Judge further held that even if the authority who is to issue the eligibility certificate finds that a unit is eligible for exemption, if it is found by the authority who is to issue the exemption order that the said unit is not eligible for the exemption claimed, it can refuse to grant the exemption.

27. The scheme for tax exemption as discernible from the notification in question is SRO.No.1729/93 is similar to the one considered by this court in Tamil Nadu Ammonia. I am therefore unable to accept the submission of Sri.Vellappally that the third respondent acted without jurisdiction in deciding the question of eligibility of the petitioner for tax exemption. In my view, the respondent not only had the jurisdiction but also the obligation to consider whether the petitioner is entitled for sales tax exemption. The third respondent was only obliged to take note of two things as certified in Ext.R1(a) certificate of

eligibility. That the petitioner had commenced commercial production on the date mentioned in the certificate of eligibility which is in the present case is 6.3.2001, and that the monetary limit of tax exemption the unit is eligible for Rs. 30,46,94,552/-. Subject to the aforementioned two factors the actual issuance of tax exemption certificate which obviously can only be in consequence of a finding that the unit is entitled to be exempted from payment of tax was within the domain of the third respondent. This he obviously proceeded to do when he passed Ext.P24 order. Ext.P24 cannot be termed as ultravires the jurisdiction of the third respondent.

28. I also note that the condition included in Ext.R1(a) eligibility certificate that the Deputy Commissioner shall decide on the eligibility of the unit for sales tax exemption is only a reiteration of the obvious. The third respondent not only has the jurisdiction but the obligation to decide the question of exemption from payment of sales tax and in doing so he has to decide whether the petitioner is entitled to exemption.

29. I do not think that Ext.P2 judgment in any manner provided for a different scenario as far as the jurisdiction exercised by the second respondent on one hand and the third

respondent on the other hand are concerned. There is no direction or finding or observation in Ext.P2 judgment which would suggest that in deciding the question of eligibility, the second respondent would also decide the question of exemption nor does Ext.P2 judgment suggest that the third respondent Deputy Commissioner, while deciding the question of exemption would not be required to consider whether the unit is entitled to exemption in terms of the statutory notification. This court had considered the correctness of the proceedings of the Director of Industries which was impugned in the earlier writ petition (Ext.P10 marked in this writ petition). This court found that the Director had acted as the mouth piece of the State Level Committee and apparently the decision to reject the petitioner's application for exemption was taken by the Committee and expressed through the Director. This court found that the Director is the competent authority and he will have to decide the question of eligibility in terms of the notification independently and should not be permitted to be dictated by the State Level Committee. It was also found by this court that the finding in Ext.P10 order that the purchase order and other documents related to payment of advance to machinery suppliers

do not show that the company has fully satisfied the definition of "effective steps" was not substantiated. This court had also considered the scope and ambit of the terms 'effective steps' as mentioned in SRO.No.1092/99 and modified in SRO.No.295/2000. Ultimately the mandamus to the second respondent was to take a decision on the petitioner's application afresh within the time frame mentioned in the Act and to pass a reasoned order adverting to the documents produced or to be produced by the petitioner in support of the contention that the petitioner has taken effective steps for setting up the industrial unit prior to first January 2000. This was all what was directed by the learned judge in Ext.P2 judgment and it was so construed by the Division Bench as well. In my view Ext.P2 judgment obviously cannot be construed as conferring authority on the second respondent to decide the question of eligibility entitlement of the petitioner for sales tax exemption. If the direction issued in Ext.P2 judgment is construed in such a fashion, it will amount to altering the scheme for tax exemption as provided in the statutory application.

30. A reading of Ext.P2 judgment in its entirety, clearly shows that this court also did not intend to issue any direction

either expanding the authority of the 4th respondent Director on the one hand or abridging the authority of the third respondent Deputy Commissioner of Sales Tax on the other hand. This court in Ext.P2 judgment directed the statutory authorityto do what it is expected to do in accordance with law and in terms of the notification.

31. Mr.Vellappally contended that the interpretation of the terms of the notification in such a manner as to acknowledge a jurisdiction with the third respondent Deputy Commissioner to decide the question of eligibility would lead to a situation where notwithstanding the certificate of eligibility, the Deputy Commissioner would consider himself competent to decide the question of eligibility and to decide the question of exemption as well. He contends that this will amount to the State Government, which is ultimately vested with the authority to issue a certificate of exemption to probably speak in two voices on the same issue. He refers to the judgment of the Supreme Court in Vadilal Chemicals Ltd. vs. State of A.P. (2005 (6) SCC 292). In Vadilal the Supreme Court was construing the contents of the incentive scheme floated by the Andhra Pradesh Government for setting up new industries within the State. In

para 22 of the judgment, construing the incentive scheme in question the Supreme Court held that there was only one method of verifying the eligibility for the various incentives granted including sales tax exemption. The procedure was for the matter to be scrutinised and recommended by the State Level Committee and District Level Committee and the certification by the Department of Industries and Commerce by issuing an eligibility certificate. There was no other method prescribed under the scheme for determining an industrial unit's eligibility for the benefits granted. The stand taken by the Sales Tax Department in its counter affidavit that they had decided to cancel the eligibility certificate for sales tax incentive was construed and found to be untenable by the Supreme Court. It is in this context the Supreme Court held that having regard to the language of the 1993 Government order which provided for tax exemption, the view expressed by the Department of Industries must be the voice of the Government.

32. Obviously the terms of the notification/order was being construed by the Supreme Court in Vadilal. The Government order which was construed by the Supreme Court apparently contemplated conferment of authority on the

industries department to decide the question of eligibility of a unit for sales tax exemption. A further process to be undertaken by any other authority was not part of the notification on the scheme which was considered by the Supreme Court in Vadilal. In other words, the Committee was conferred with the comprehensive powers of deciding all issues relating to the entitlement of a unit for sales tax exemption. On the other hand the notification in question provided for the issue of eligibility to be decided by the Director and this essentially relates to certifying the commencement of commercial production by the unit for the purpose of the notification and certifying the monetary limit of exemption that the unit is eligible for. The crucial issue as to whether the unit is entitled for exemption is a matter which has to be decided by the third respondent. As mentioned above the delineation of authority is clear and there is no overlapping of the powers and functions of the second respondent and the third respondent.

Regarding contention No.(2)

33. The next issue to be considered is whether the finding in Ext.P24 order that the petitioner had failed to satisfy the

eligibility conditions prescribed in the notification Ext.P1 read with Ext.P1(a) and P1(b), in the matter of placing firm orders for "necessary plant and machinery" is justified or not. In para 13 to 16 supra, I have mentioned in detail the notice issued by the third respondent subsequent to Ext.P2 judgment, proposing to reject the petitioner's application for exemption on the ground that the petitioner did not satisfy the eligibility conditions. To Ext.P13 notice issued in this regard, a reply was given by the petitioner's advocate as Ext.P14 and a further reply was given on Ext.P14. Thereafter on 20.9.2006 a fresh notice was issued by the third respondent intimating the petitioner that the application for exemption is proposed to be rejected on the additional ground that the activities carried on by the petitioner's unit does not amount to manufacturing activity within the meaning of SRO.No.1729/93. A further reply was given by the petitioner as Ext.P22. Ext.P23 is a written submission made by the petitioner before the Deputy Commissioner subsequent to a personal hearing on 23.11.2006. It is thereafter that Ext.P24 impugned order was passed. In Ext.P13 notice issued by the third respondent he noticed that the question which ultimately arises for decision is whether the company had placed firm

orders for the purchase of "necessary plant and machinery" before 1.1.2000. He noticed that the plant and machinery contemplated are those which are required for the company to commence commercial production. "Necessary plant and machinery" would mean such plant and machinery as are required for each and every stage of production. In the case of a company which is engaged in the production of soft drinks, it would mean machinery for drawing of water required in the manufacture of soft drinks, its purification to confirm to requisite standards, machinery required for manufacturing the mix which goes into the making of the ultimate product, machinery for the manufacture of the soft drink by mixing the ingredient in water and bottling and sealing and labeling of the soft drink. The subsequent operations of moving the crates and transportation may not come into the picture as they are ancillary. Necessary plant and machinery must mean that plant and machinery which is required for all the stages of production right from the stage of drawing of water to the stages of bottling, sealing and labeling. It is further noted in Ext.P13 that " out of the necessary required machineries the unit is seen to have placed firm orders before the cut off date only for a "conveyor system" and "mixing plant"

costing about Rs.105 lakhs, i.e. orders are seen placed in accordance with the notification only for two items of the several necessary items of plant and machinery.

34. The total cost of plant and machinery as claimed by the petitioner, in the application for sales tax exemption is Rs.32,10,13,534/-. As noted in para 13 above (which is extracted from Ext.P13) apparently firm orders had been placed by the petitioner only for three items which would come under the category of necessary plant and machinery. Though three replies were given by the petitioner to Ext.P13, viz. Ext.P14 on 30.6.2005, Ext.P22 dated 29.9.2006 and thereafter Ext.P23 written submissions was made on 1.12.2006 after the personal hearing, it was not the case of the petitioner at any point of time that firm orders had been placed by them for other plant and machinery which will come under the category of necessary plant and machinery in terms of the notification. As noted above Ext.P25 is a flow chart showing the manufacturing process undertaken by the petitioner. It is the petitioner's case that an elaborate process is undertaken in its unit for the manufacture of soft drinks. Therefore it has to be found that the plant and machinery required for sugar purification, carbon purification,

blending of the soft drink concentrate with treated liquid sugar, transfer of the product after blending to the filling unit for treatment with carbon dioxide are obviously the necessary plant and machinery required in the manufacturing process of the unit. Apart from the same, the plant and machinery required for drawing of water and then for water purification which according to the petitioner itself consists of primary purification involving Coagulation, Reverse Osmosis and ion Exchange, Primary disinfection followed by particle filtration using carbon and silica, ultimately ending with final disinfection using ultra violet rays for water purification are necessary plant and machinery. Even according to the petitioner, the equipments used in this regard are high cost equipments. The petitioner further claims that stringent process controls are employed to ensure that the product confirms to the requisite standard which the petitioner maintains. If each one of the aforesaid activities are part of the manufacturing process undertaken by the petitioner, then it is only reasonable to construe that the plant and machinery deployed for the same are "necessary plant and machinery". Ext.P13 specifically alleged that firm orders are seen to have been placed by the petitioner in respect of "necessary plant and

machinery" only for Pet and CSD conveyor systems (item No.1 therein) and Paramix plant consisting of Deareation plant, Mixing plant, Beverage chilling plant and Carbonation plant (item No.2 therein). It is significant to note that the petitioner did not come out with any specific reply at any point of time prior to Ext.P24 indicating that steps were taken for acquiring necessary plant and machinery in relation to other aspects of the manufacturing process. In other words, no material as such was produced before the third respondent to show that steps were taken by the petitioner in relation to other " necessary plant and machinery" deployed in the unit as such. The crucial factor in the case of self financing units are " acquiring or placing firm orders for the purchase of necessary plant and machinery before 1.1.2000." The deeming provision in the notification, relating to placement of firm orders further states that for the purchase of plant and machinery and equipments if such unit had made any advance payments in the matter indicated therein prior to 1.1.2000 then it shall be deemed that the unit has placed firm orders in respect of such plant and machinery. Benefit of the deeming provision in the notification is available to the petitioner only in respect of the three items of plant and machinery indicated in Ext.P13

(according to the third respondent it is only items 1 and 2). The deeming provision is not even invoked in respect of other plant and machinery which are admittedly necessary for the manufacturing process undertaken by the petitioner. It is not the petitioner's case that any plant and machinery as such was acquired before the cut off date i.e. 1.1.2000. In the circumstances the finding in Ext.P24 that the petitioner had not acquired or placed firm orders for the purchase of **necessary plant and machinery** seems to be based on the materials on record and is otherwise tenable.

35. I also note that even in the writ petition the petitioner has not assailed the factual finding in Ext.P13 and Ext.P24 that the petitioner had placed firm orders only in respect of two or (three) items of plant and machinery, necessary for the manufacturing process. The petitioner has produced Ext.P27 along with the reply affidavit. Ext.P27 purports to be the details of the firm purchase orders placed before 31.12.1999. The first item mentioned therein is sub lease of property and obviously it is irrelevant as far as sub clause © of the notification is concerned. Items 2, 3, 4 and 6 are already noted in Ext.P13 order. Item No.5 in Ext.P27 is a building foundation, roads,

boundary walls and these are obviously not part of necessary plant and machinery. Item No. 7 is described as unscrambler and air conveyor and item NO.8 is a gripper, rinser, warmer and case packer and item No.9 is described as Filler/Capper. It is not very clear whether item 7 is part of necessary plant and machinery and if so, in which part of the manufacturing process it is integrally used. In so far as items No.8 and 9 are concerned it is not clear whether it is already part of the items which have been taken note of by the third respondent. At any rate it is difficult to place any reliance on items 7,8 and 9 mentioned in Ext.P27 for the reason that they were never indicated in any of the replies submitted by the petitioner before the third respondent. More over even assuming that firm orders were placed in relation to items 7,8 and 9 of Ext.P27, obviously the petitioner had not either acquired or placed firm orders for the "necessary plant and machinery" required for the unit as such. In other words, the petitioner did not satisfy the conditions for eligibility, entitlement and exemption from payment of tax in terms of the notification SRO 1729/1993 as amended by SRO.No.1092/1999 and modified by SRO.No.295/2000. The finding in this regard in Ext.P24 cannot be faulted with.

36. In the facts stated in column 3 of Ext.R1(a), the Director noted that the claim of the unit under plant and machinery for eligibility certificate is Rs.32,10,13,534/-. In para 8, thereafter the Director further mentioned that the total cost of plant and necessary of the unit as claimed by the petitioner is for the necessary plant and machinery required for each and every stage of production. Thus when the petitioner makes a claim, for the purpose of exemption that it has made an investment to the tune of Rs.32,10,13,534/- towards plant and machinery deployed in the unit, it obviously is the case of the petitioner that the said investment relates to necessary plant and machinery in the unit. As noted by the Director necessary plant and machinery are all the components of machinery and equipments constituting a complete production plant and machinery necessary for all the stages of production right from the stage of drawing of water to the stages of manufacturing, bottling, sealing and labeling. The items of plant and machinery for which firm orders were placed prior to the cut off date on 1.1.2000 even according to the petitioner are obviously only a small percentage of the plant and machinery. It is significant to note that the said aspects noted in Ext.R1(a) have not been

challenged in the writ petition. No doubt the petitioner has a case that Ext.R1(a) certificate of eligibility was not earlier communicated to the petitioner despite several requests. But the petitioner would have received the above when it was produced along with the counter affidavit. It was open to the petitioner, if so advised, to have amended the writ petition challenging Ext.R1(a). I note this only because the petitioner had taken up a contention that since there is a certificate of eligibility issued by the Director, there was nothing else to be done by the Deputy Commissioner except to quantify the exemption and issue an exemption certificate to the petitioner. That does not seem to be the purport of the scheme for exemption. The Director had noted the above aspects in Ext.R1 (a) and it is not the case of the petitioner that the Director had no jurisdiction to note the requisite facts in para 3 to 10 of Ext.R1(a).

37. Accordingly, I hold that

(i) the activity carried on by the petitioner in its unit at Kanjikode, Palakkad, engaged in the production of soft drinks is a manufacturing activity within the meaning of SRO.1729/93.

(ii) In terms of the scheme for exemption from payment of tax as contained in SRO.No.1729/93, the certificate of eligibility to be issued by the Director is intended only to certify the actual commencement of commercial production of the unit before the cut off date and the monetary limit of tax exemption that the unit would be eligible for. At the same time the Director of Industries is not required to certify the entitlement of the unit for tax exemption.

(iii) The entitlement of the unit for exemption from payment of tax is to be certified by the Deputy Commissioner of sales tax, in SRO.No.1729/1993. Such certification of the entitlement is to be contained in the exemption certificate issued by the Deputy Commissioner.

(iv)Ext.P24 order passed by the Deputy Commissioner cannot be said to be without jurisdiction. It is with jurisdiction and the finding therein to the effect that the petitioner has not satisfied the conditions mentioned in

SRO.No.1729/93 as amended by SRO.1092/99 and modified by SRO.No.295/2000 is correct and justified. The said finding does not require any interference.

(v) Ext.P24 is therefore upheld subject to the finding in para (i) above viz. the activity carried on by the petitioner in its unit for the production of soft drinks is a manufacturing activity within the meaning of SRO.No.1729/1993.

For all the reasons mentioned above, I hold that the writ petition is bereft of merit. The same is therefore dismissed. There will be no order as to costs.

V. GIRI, JUDGE.

pmn/